

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 6, 2007

IN RE ADOPTION OF S.T.D. & J.K.D.

Appeal from the Chancery Court for Knox County
No. 06-167277-2 Daryl R. Fansler, Chancellor

No. E2007-01240-COA-R3-PT - FILED OCTOBER 30, 2007

Petitioners filed this action to adopt twin children S.T.D. and J.K.D. (“the children”) and to terminate the parental rights of Respondent B.L.L., and the trial court granted their petition. We hold that (1) Respondent, who argued at trial that he was the biological father of the children, is not entitled to “legal parent” status under Tenn. Code Ann. § 36-1-113(g)(9)(A) because Respondent at no time took any legal action to establish paternity; (2) Petitioners established by clear and convincing proof the following grounds for termination of Respondent’s parental rights: (A) failure to seek reasonable visitation of the children,¹ (B) failure to manifest an ability and willingness to assume custody,² (C) placement of the children in Respondent’s custody would pose a risk of substantial harm to the children,³ (D) failure of Respondent to file a petition to establish paternity within 30 days after notice of alleged paternity by the children’s mother,⁴ (E) removal for more than six months and persistent conditions that would likely cause the children to be subjected to further abuse and neglect and prevent the children’s safe return,⁵ and (F) abandonment by the Respondent;⁶ (3) Petitioners established by clear and convincing evidence that termination was in the best interest of the children; and (4) the trial court did not abuse its discretion in denying Respondent’s request to attend the trial in person, allowing him instead to testify via telephone from prison. We therefore affirm the judgment of the trial court terminating Respondent’s parental rights and allowing Petitioners to adopt the children.

¹Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii).

²Tenn. Code Ann. § 36-1-113(g)(9)(A)(iv).

³Tenn. Code Ann. § 36-1-113(g)(9)(A)(v).

⁴Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi).

⁵Tenn. Code Ann. § 36-1-113(g)(3).

⁶Tenn. Code Ann. § 36-1-113(g)(1).

Tenn. R. App. P. 8A Appeal as of Right; Judgment of the Chancery Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Robert A. Cole, Knoxville, Tennessee, for the Appellant, B.L.L.

Dawn Coppock, Strawberry Plains, Tennessee, for the Appellees, L.T.K. and A.L.K.

Rufus W. Beamer, Jr., Knoxville, Tennessee, guardian ad litem for the minors, S.T.D. and J.K.D.

OPINION

I. Background

The Respondent was incarcerated on two felony burglary charges when the children were born on August 12, 2004. At the time of the children's birth and through the time of trial, the Mother, A.R.D., was married to J.D. The parental rights of Mother and her husband were terminated by prior default judgment, and their rights are not at issue in this case. The Respondent claims to be the biological father of the children,⁷ and neither the Mother nor anyone else has disputed his claim.

For the first six months of their lives, the children were in the Mother's custody. Respondent got out of jail on November 16, 2004, some three months after the children's birth, and he lived with Mother after his release. On February 10, 2005, Mother turned the children over to her stepmother and father, saying, "here, I'm tired. I can't take care of them. They're yours." The stepmother was a co-worker and friend of Petitioner A.L.K., the adoptive mother, who agreed to help take care of the children. The stepmother delivered the children to the Petitioners "probably about three or four hours" after Mother dropped the children off. The children have stayed with and been cared for by the Petitioners ever since.

By order entered April 26, 2005, the Roane County Juvenile Court removed custody from the Mother and Respondent and granted the Petitioners temporary legal custody of the children, finding the children to be dependent and neglected. Respondent testified that he had actual notice of the Juvenile Court hearing, but that he was then in violation of his probation and did not attend the hearing because he "didn't want to go back to prison."

On April 11, 2006, Respondent was again incarcerated, and he was in prison at the time of the trial. On June 15, 2006, Petitioners filed their petition seeking to adopt the children and to terminate Respondent's parental rights. Following a bench trial, the trial court ruled that Petitioners

⁷The trial court found that Mother's husband, J.D., was in prison at the time of the children's conception.

had established by clear and convincing evidence the following statutory grounds for terminating Respondent's parental rights:

(1) Failure of the Respondent, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses in accordance with his financial means, Tenn. Code Ann. § 36-1-113(g)(9)(A)(i);

(2) Failure of the Respondent, without good cause or excuse, to make reasonable and consistent child support payments, Tenn. Code Ann. § 36-1-113(g)(9)(A)(ii);

(3) Failure of the Respondent to seek reasonable visitation of the children, Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii);

(4) Failure of the Respondent to manifest an ability and willingness to assume legal and physical custody of the children, Tenn. Code Ann. § 36-1-113(g)(9)(A)(iv);

(5) Placing custody of the children with Respondent would pose a risk of substantial harm to the children's welfare, Tenn. Code Ann. § 36-1-113(g)(9)(A)(v);

(6) Failure of the Respondent to file a petition to establish paternity of the children within 30 days after notice of alleged paternity by the children's Mother, Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi);

(7) Removal of the children for six months and persistent conditions that would in all reasonable probability cause the children to be subjected to further abuse or neglect, little likelihood that these conditions will be remedied at an early date, and that continuation of the relationship with Respondent greatly diminishes the children's chances of early integration into a safe, stable and permanent home, Tenn. Code Ann. § 36-1-113(g)(3); and

(8) Abandonment by the Respondent, Tenn. Code Ann. § 36-1-113(g)(1).

The trial court further found by clear and convincing evidence that termination was in the best interest of the children.

II. Issues Presented

Respondent appeals, raising the following issues, as restated:

1. Whether the trial court erred in holding that Petitioners had established by clear and convincing evidence a statutory ground for terminating his parental rights.

2. Whether the trial court erred in holding that Petitioners had demonstrated by clear and convincing evidence that termination of his parental rights was in the best interest of the children.

3. Whether the trial court erred in denying Respondent's request to attend the trial in person, allowing him instead to testify via telephone from prison, pursuant to Tenn. Code Ann. § 36-1-113(f)(3).

III. Analysis

A. Standard of Review

A biological parent's right to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the due process clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). Although this right is fundamental and superior to claims of other persons and the government, it is not absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004). This right continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Although "parents have a fundamental right to the care, custody, and control of their children," this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute. *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger, "severing forever all legal rights and obligations of the parent." Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 565, 136 L.Ed.2d 473 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S.Ct. 1388, 1412, 71 L.Ed.2d 599 (1982) (Rehnquist, J., dissenting)). As a result, "[t]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* The constitutional protections of the parent-child relationship require certain safeguards before the relationship can be severed. *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). This most drastic interference with a parent's rights requires "the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

Termination proceedings are governed by statute in Tennessee. Parties who have standing to seek the termination of a biological parent's parental rights must first prove at least one of the statutory grounds for termination. Tenn. Code Ann. § 36-1-113(c)(1). Secondly, they must prove that termination of the parent's rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2). Because the decision to terminate parental rights has profound consequences, courts must apply a higher standard of proof in deciding termination cases. Therefore, to justify termination of parental rights, the party seeking termination must prove by clear and convincing evidence the ground (or grounds) for termination and that termination is in the child's best interest. Tenn. Code

Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., Aug. 13, 2003), *no appl. perm. filed*, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to either as to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's specific findings of fact are first reviewed and are presumed to be correct unless the evidence preponderates against them. We then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *In re S.M.*, 149 S.W.3d 632, 640 (Tenn. Ct. App. 2004). The trial court's conclusions of law are reviewed *de novo* and are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

B. "Legal Parent" Status Under Tenn. Code Ann. § 36-1-113(g)(9)(A)

We first address whether Respondent is a "legal parent" as defined by the legislature at Tenn. Code Ann. §§ 36-1-113(g)(9)(A) and 36-1-102(28). The "legal parent" designation is important because it determines whether Petitioners are entitled to rely upon the less stringent grounds for termination listed at Tenn. Code Ann. § 36-1-113(g)(9)(A)(i)-(vi). *In re S.M.*, 149 S.W.3d 632 at 640-41; *In re H.A.L.*, No. M2005-00045-COA-R3-PT, 2005 WL 954866, at *9 (Tenn. Ct. App. M.S., Apr. 25, 2005). Although Respondent did not raise on appeal the issue of whether the trial court correctly held him not to be a "legal parent," this threshold issue is of sufficient significance to his fundamental constitutional rights that we elect in our discretion to address it.

At all pertinent times, the governing statute provided as follows:

(9)(A) The parental rights of any person who, at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child, is not the legal parent or guardian of such child or who is described in § 36-1-117(b) or (c) may also be terminated based upon any one (1) or more of the following additional grounds:

(i) The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth;

(ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;

(iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36-1-102(1)(c);

(iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;

(v) Placing custody of the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child; or

(vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child's mother, or as required in § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117(c)(3)[.]

Tenn. Code Ann. § 36-1-113(g)(9)(A).

Tennessee Code Annotated § 36-1-102(28) defines "legal parent" as

(A) The biological mother of a child;

(B) A man who is or has been married to the biological mother of the child if the child was born during the marriage or within three hundred (300) days after the marriage was terminated for any reason,

or if the child was born after a decree of separation was entered by a court;

(C) A man who attempted to marry the biological mother of the child before the child's birth by a marriage apparently in compliance with the law, even if the marriage is declared invalid, if the child was born during the attempted marriage or within three hundred (300) days after the termination of the attempted marriage for any reason;

(D) A man who has been adjudicated to be the legal father of the child by any court or administrative body of this state or any other state or territory or foreign country or who has signed, pursuant to §§ 24-7-113, 68-3-203(g), 68-3-302 or 68-3-305(b), an unrevoked and sworn acknowledgment of paternity under the provisions of Tennessee law, or who has signed such a sworn acknowledgment pursuant to the law of any other state, territory, or foreign country; or

(E) An adoptive parent of a child or adult[.]

After the trial, the trial court delivered an oral memorandum opinion that was incorporated into the final judgment. The trial court found as follows regarding Respondent's argument that he is the children's father:

Certainly there's evidence or testimony in the record that at some time [Respondent] claimed that he was the father of the children, and, of course, the mother claimed that he was the father of the children. But he's not listed on the birth certificate, he's never signed an acknowledgment of paternity. There's been no paternity test conducted, there's been no effort by [Respondent] to establish paternity.

* * *

While all of these statements and claims are certainly sufficient to entitle [Respondent] to notice of proceedings and to be made a party to this action, the court still questions what is in this record even by a preponderance of the evidence standard to show that [Respondent] is in fact the biological father of these children. But having noted that, I'm going to proceed with the analysis of this case treating [Respondent] as if he were the biological father of the children, but making no finding of fact that indeed he is.

The trial court did not make an explicit finding that Respondent was not a "legal parent" as statutorily defined, but such a finding is implicit in the trial court's ruling that his rights would be terminated based on the grounds at Tenn. Code Ann. § 36-1-113(g)(9)(A). As the trial court noted, Respondent did not sign an unrevoked and sworn acknowledgment of paternity as required by Tenn.

Code Ann. § 36-1-102(28)(D), nor was Respondent ever adjudicated to be the children’s legal father by a court or administrative body. Further, Tenn. Code Ann. § 36-1-113(g)(9)(A) makes available grounds for termination contained therein as against someone “who is described in § 36-1-117(b) or (c).” Section 117(c) applies to “the putative biological father of a child who has not filed a petition to establish paternity of the child or who has not established paternity of the child who is the subject of an adoption proceeding.” It is undisputed that Respondent has never filed a petition to establish paternity, nor has he taken legal action of any kind to establish paternity. Thus, we hold that under the clear requirements of the statute, Respondent was not entitled to “legal parent” status, and that the trial court correctly found that the grounds for termination at Tenn. Code Ann. § 36-1-113(g)(9)(A) were available against Respondent.

C. Grounds for Termination of Parental Rights

We further hold that the trial court correctly ruled that Petitioners successfully proved by clear and convincing evidence several grounds supporting the termination of Respondent’s parental rights. While T.C.A. § 36-1-113(g) lists multiple grounds upon which parental rights may be terminated, “the existence of any one of the statutory bases will support a termination of parental rights.” *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005); *In re C.T.S.*, 156 S.W.3d 18, 22 (Tenn. Ct. App. 2004); *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000). Although our review of the record does not persuade us that Petitioners established by clear and convincing evidence the grounds found at Tenn. Code Ann. § 36-1-113(g)(9)(A)(i)⁸ and (ii),⁹ we find these remaining grounds relied upon by the trial court have been established: (1) failure to seek reasonable visitation of the children, Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii); (2) failure of the Respondent to manifest an ability and willingness to assume legal and physical custody of the children, Tenn. Code Ann. § 36-1-113(g)(9)(A)(iv); (3) placement of the children in Respondent’s custody would pose a risk of substantial harm to the children’s welfare, Tenn. Code Ann. § 36-1-113(g)(9)(A)(v); (4) failure of the Respondent to file a petition to establish paternity of the children within 30 days after notice of alleged paternity by the children’s mother, Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi); (5) removal of the children for six months and persistent conditions that would in all reasonable probability cause the children to be subjected to further abuse or neglect, little likelihood that these conditions will be remedied at an early date, and continuation of the relationship with Respondent greatly diminishes the children’s chances of early integration into a safe, stable and permanent home, Tenn. Code Ann. § 36-1-113(g)(3); and (6) abandonment by the Respondent, Tenn. Code Ann. § 36-1-113(g)(1).

1. Failure to Pay Birth Expenses

⁸“The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person’s financial means promptly upon the person’s receipt of notice of the child’s impending birth.” Tenn. Code Ann. §36-1-113(g)(9)(A)(i).

⁹“The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101.” Tenn. Code Ann. §36-1-113(g)(9)(A)(ii).

Tenn. Code Ann. § 36-1-113(g)(9)(A)(i) provides for termination of a non-legal parent's rights upon a showing that "[t]he person has failed, *without good cause or excuse*, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child *in accordance with the person's financial means* promptly upon the person's receipt of notice of the child's impending birth." (Emphasis added). The record does not support a finding by clear and convincing evidence that this ground was met. As noted, Respondent was in prison before and at the time of the children's birth. Petitioners did not demonstrate that Respondent had any financial means to pay a reasonable share of birth expenses during the pertinent time period, nor that his failure was "without good cause or excuse."

2. Failure to Pay Child Support

Tenn. Code Ann. § 36-1-113(g)(9)(A)(ii) provides for termination of a non-legal parent's rights upon a showing that "[t]he person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101." In order to demonstrate what the child support guidelines require, there must be some evidence of the obligor's income. In this case, Petitioners did not provide evidence of Respondent's income, and although Respondent testified that he worked for a time as a roofer but that business was slow because it was wintertime, the proof does not clearly demonstrate that Respondent had any kind of a regular income at all. Therefore, we hold that the ground of failure to pay reasonable child support was not proven by clear and convincing evidence.

3. Failure to Seek Visitation

Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii) provides for termination of a non-legal parent's rights upon a showing that "[t]he person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in § 36-1-102(1)(C)." Respondent was out of prison for fourteen months during the time the Petitioners had physical and legal custody of the children. The Petitioners testified that Respondent never requested visitation or offered them child support. They described a single incident where Respondent showed up at a McDonald's during Mother's visitation with the children, after temporary legal custody was granted to Petitioners. Petitioners testified that the Respondent immediately demanded to be given S.T.D. and when the adoptive father refused, Respondent began angrily cursing them and punching his hand with his fist. There is nothing in the record, including Respondent's own testimony, that contradicts Petitioners' statements that Respondent never once requested visitation with the children. We therefore affirm the trial court's ruling terminating Respondent's parental rights on the ground that he failed to seek reasonable visitation with the children.

4. Failure to Manifest Ability and Willingness to Assume Custody

Regarding Tenn. Code Ann. § 36-1-113(g)(9)(A)(iv), requiring a showing that Respondent “failed to manifest an ability and willingness to assume legal and physical custody of the child[ren],” we note that the record does not show that Respondent ever offered a single act of support, financial or otherwise, to Mother or the children. As already noted, Respondent never made any effort to visit the children during the time he was not incarcerated. The single incident where Respondent appeared at McDonald’s during Mother’s visitation ended with Respondent behaving in an angry and threatening manner.

Respondent apparently has three other children, two of whom live in Illinois. Respondent testified that he has never paid child support to the mother of his children in Illinois. Respondent’s other child, presumably the sibling of the children in this case, was staying with the stepmother at time of trial. She testified that Respondent has never checked on that child and has never offered her any child support. All of this evidence demonstrates that Respondent has not manifested any kind of ability to assume legal and physical custody of the children. Although Respondent arguably manifested some “willingness” to assume custody, our review of his testimony reveals that his general attitude was one of outrage and protest that someone would take away something that was “his” (the children) rather than one of any genuine concern for the children’s welfare. The trial court specifically found Respondent’s testimony not to be credible. We affirm the trial court’s ruling terminating Respondent’s rights on the ground that Respondent failed to manifest an ability and willingness to assume legal and physical custody of the children.

5. Risk of Substantial Harm

We further find that the proof supports the trial court’s conclusion that Petitioners proved by clear and convincing evidence that placing the children in Respondent’s legal and physical custody “would pose a risk of substantial harm to the physical or psychological welfare of the child[ren].” Tenn. Code Ann. § 36-1-113(g)(9)(A)(v).

The following facts established at trial are pertinent to an analysis of Respondent’s argument that the trial court erred in finding grounds to terminate his parental rights. At time of trial, the children were 2 years and 11 months old, and Respondent was in prison for the second time. During the approximately three months that Respondent was living with Mother and the children, they were evicted from their apartment for failure to pay rent. The trial court found no credible evidence that Respondent was employed during that time or that he ever made any payments of support to Mother or the children. Respondent admitted that he chronically abused drugs and that he was disciplined for drug abuse in prison. The stepmother testified that while Mother was around Respondent she was very unstable, that Mother did not take care of her children, that “she doesn’t provide for them, they go hungry,” and that Mother’s drug abuse was “very, very bad.”

Amber Goins, a co-worker and friend of Mother, testified at the trial. Ms. Goins, who was then a seventeen-year old high school student, stated that she arranged her work schedule at Shoney’s so that she could take care of the children for Mother while Mother was working. Ms. Goins took care of the children at her home, sometimes keeping them the whole night, and sometimes as much

as 40 hours a week. Ms. Goins stated that after Respondent was released from prison and lived with the children, their physical condition deteriorated:

A: Well, at first it [the babies' condition] was okay. Like it wasn't great but it was okay. Closer to the end they started dropping weight...especially [S.T.D.], he got pretty far down there in his weight. They always had a chest cold. They were always coughing, always congested. Terribly, terribly congested. [They] both had numerous accounts where they would have diaper rashes. There was one instance where [J.K.D.] near the end had such a terrible diaper rash that it put blisters on her. And we actually had to go to my family's physician and get some salve for her because it was terrible.

* * *

[I]t was to the point where [S.T.D.], every time he would take a bottle he couldn't keep anything down because he had so much congestion that he would get to coughing and he would throw it back up. Like, he couldn't keep anything down. But it was because he was so sick.

* * *

[Mother] was totally different when [Respondent] wasn't – like whenever he got out of jail she was a totally different person. Like that's when I started noticing the decline in the babies' health, that's when I started noticing the decline in their care.

Ms. Goins described an evening when she accompanied Mother to Mother's home at her request. When they arrived, Respondent met them at the door with a gun in his hand, pointing it at them and demanding to know who Ms. Goins was. After they got inside, Mother and Respondent got into a fight. Ms. Goins testified that at one point Respondent was holding S.T.D. and dropped him onto Mother's chest, resulting in his free fall for about a foot. Ms. Goins said she witnessed Respondent abuse Mother verbally and physically over the course of the evening. Ms. Goins ended up spending the night on the couch, and during the night, the children woke up hungry and were crying. Ms. Goins stated that she waited to see if Mother or Respondent would respond to them, and when they did not, she got up and fed them. Ms. Goins testified that she had told Mother that if she didn't straighten up and get away from Respondent, that Ms. Goins was "going to call DHS on her." The trial court specifically credited Ms. Goins's testimony, finding that her "truthfulness and credibility seemed to be definitely beyond reproach."

Petitioner A.L.K. also testified as to the physical condition of the children when she and her husband got them:

It was February 10th, freezing cold, they had no coats, no blankets, they had maybe an ounce of formula for two children. No bottles.

Their noses were crusted with mucous. They were coughing, rattling. The car seats they came in were filthy and smoke-infested. They were totally filthy. The little girl...we picked her up to try to start cleaning her up and everything and changing her, her bottom was excoriated horribly, skin peeling, blisters . . .

As far as [S.T.D.], he was – I don’t know how – he had no expression about him whatsoever. If he looked at you at all he might as well been looking at the wall . . . He had spindly arms, protruding abdomen that was very distended, very hard . . . He did not have a bowel movement for the first four days that we had him.

The stepmother similarly described the children’s condition when she got them from Mother.

Based on the facts established in the record, including those outlined above, we affirm the trial court’s ruling terminating Respondent’s rights on the ground that placing the children in Respondent’s legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the children. Tenn. Code Ann. § 36-1-113(g)(9)(A)(v).

6. Failure to Establish Paternity

Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi) requires a showing that “the person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child’s mother, or as required in § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117(c)(3).” It is undisputed that Respondent has never filed a petition to establish paternity. We affirm the trial court’s ruling terminating Respondent’s parental rights on this ground.

7. Persistent Conditions

The trial court held that Petitioners proved the ground provided at Tenn. Code Ann. § 36-1-113(g)(3), which requires a showing that:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child’s removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child’s safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home[.]

In this case, the children had been removed from Respondent's home by order of the Roane County Juvenile Court for approximately sixteen months at the time of the petition. See *In re Audrey S.*, 182 S.W.3d 838, 872 (Tenn. Ct. App. 2005). The juvenile court expressly based its order granting temporary legal custody to Petitioners upon its finding that the children were dependent and neglected.

Based on our review of the record, including the evidence discussed in subsection 5 (Risk of Substantial Harm) above, we agree with the trial court that Petitioners have established that the grounds for termination at Tenn. Code Ann. § 36-1-113(g)(3) have been met. Nothing in the record, which includes Respondent's testimony, suggests that there is any possibility that the deplorable conditions of neglect from which the children suffered while in the custody of Mother and Respondent are likely to be remedied so that the children could be safely returned to Respondent.

8. Abandonment

Tenn. Code Ann. § 36-1-113(g)(1) requires a showing by clear and convincing evidence that abandonment by the parent or guardian has occurred, as defined in relevant part by Tenn. Code Ann. § 36-1-102 as follows:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

* * *

(iv) *A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child[.]*

Tenn. Code Ann. § 36-1-102 (Emphasis added). At trial, Petitioners withdrew their request to terminate based on willful failure to visit or make reasonable child support payments during the pertinent four-month period prescribed by the statute, relying solely on their allegation that Respondent “has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.”

We are of the opinion that considering the totality of the circumstances and the evidence outlined above, and bearing in mind the trial court’s credibility assessments, there is clear and convincing evidence that the Respondent’s history of violence, drug abuse, lack of employment, and incarceration, coupled with his near-complete lack of support for Mother and the children, failure to exhibit any interest in visitation with the children, and the poor physical condition of the children while in his and Mother’s care, constitutes a wanton disregard for the welfare of the children. We therefore affirm the trial court’s ruling terminating his parental rights on the ground of abandonment.

D. Best Interest of Children

William Mark Akers, who oversaw the required home study of Petitioner’s home and conducted two post-placement visits, testified that the children were doing very well in the custody of Petitioners, stating,

[T]he children appeared to be growing and thriving in the placement. They’re healthy, they seem well-adjusted, they bonded well with [Petitioners], the [Petitioners] are using appropriate discipline and parenting techniques with the children. The placement looks to be a very positive placement for the family and the children.

Mr. Akers concluded, “I have no concerns about the placement whatsoever.” The Petitioners have allowed Ms. Goins to continue seeing the children; she testified, “when I [saw] them on their first birthday, I couldn’t believe it was the same kids because they were so healthy and so well taken care of.” We affirm the trial court’s ruling that termination of Respondent’s parental rights is in the best interest of the children.

E. Respondent’s Denied Request to Attend Trial

One issue remains: Respondent’s argument that the trial court erred in denying Respondent’s request to attend the trial in person, allowing him instead to testify via telephone from prison, pursuant to Tenn. Code Ann. § 36-1-113(f)(3). That statute provides as follows:

Before terminating the rights of any parent or guardian who is incarcerated or who was incarcerated at the time of an action or proceeding is initiated, it must be affirmatively shown to the court that such incarcerated parent or guardian received actual notice of the following:

- (1) The time and place of the hearing to terminate parental rights;
- (2) That the hearing will determine whether the rights of the incarcerated parent or guardian should be terminated;
- (3) That the incarcerated parent or guardian has the right to participate in the hearing and contest the allegation that the rights of the incarcerated parent or guardian should be terminated, and, *at the discretion of the court, such participation may be achieved through personal appearance, teleconference, telecommunication or other means deemed by the court to be appropriate under the circumstances . . .*

Tenn. Code Ann. § 36-1-113(f) (Emphasis added).

As can be seen, the statute provides that the decision whether to allow the incarcerated parent to personally attend the trial is left to the trial court's discretion. The statute also specifically allows such person's participation by telecommunication, as happened in the present case. We have previously held in a similar case that "[i]f a prisoner's access to the court is meaningful – and telephonic access has been deemed to be meaningful – the requirements of due process are satisfied, and the prisoner has no absolute right to be in attendance." *In re S.M.N.*, No. E2005-01974-COA-R3-PT, 2006 WL 1814852, at *5 (Tenn. Ct. App. E.S., June 30, 2006) and cases cited therein. We find no abuse of discretion in the trial court's decision to deny Respondent's request to personally appear at the trial.

IV. Conclusion

For the aforementioned reasons, the judgment of the trial court is affirmed. Costs on appeal are assessed to the Appellant, B.L.L.

SHARON G. LEE, JUDGE